FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 17 1903
JAMES H. McKENNEY,
Clerk.

THE UNITED STATES OF AMERICA ON THE relation of The Riverside Oil Company, a corporation, plaintiff in error,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE Interior.

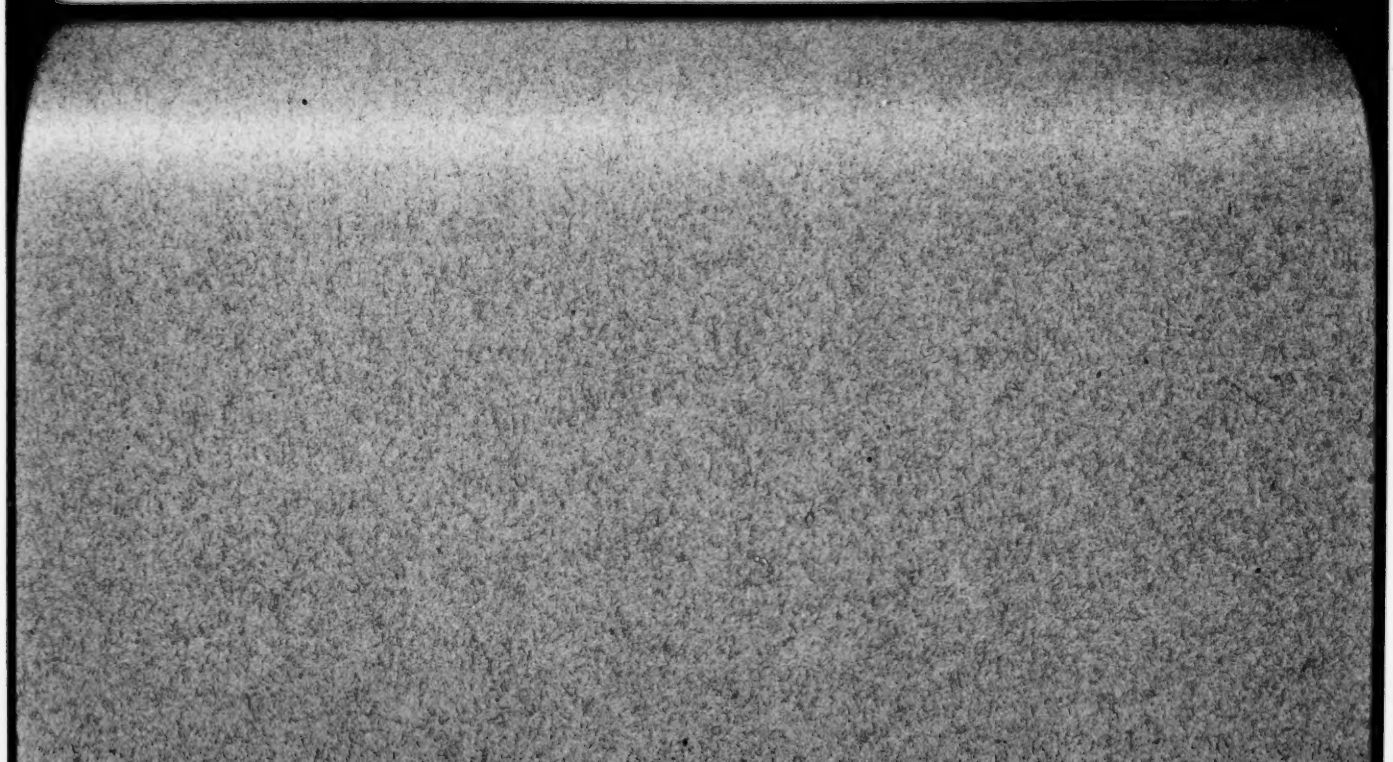
No. 632.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

MORGAN H. BEACH,
United States Attorney for the District of Columbia.
HENRY H. GLASSIE,
Assistant United States Attorney.

HENRY M. HOYT,
Solicitor-General,
JOHN S. CHAPMAN,
Special Assistant to the Attorney-General,
Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES OF AMERICA ON THE relation of The Riverside Oil Company, a corporation, appellant,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE Interior, respondent.
} No. 632.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

This proceeding was instituted by a petition filed in the supreme court of the District of Columbia on April 16, 1902, for a writ of mandamus, directed to the defendant, to command him as Secretary of the Interior "to recall and vacate an order which had been made by the Department of the Interior, rejecting certain selections of certain public lands made by one Clarke, and if such selections had already been canceled, to vacate and recall such cancellation and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as required by law, and to

order certain selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America a patent or patents for the said selected lands, and that the petitioner might have such other or further relief," and so forth (Rec., pp. 19 and 20).

In the supreme court of the District of Columbia the case came to be heard upon a demurrer to the return of the Secretary of the Interior. That court held the grounds set up in the Secretary's return to be a sufficient answer to the petition, and overruled the demurrer. Upon motion for a rehearing, the court, remaining of the same opinion, affirmed the judgment overruling the demurrer. The petitioner thereupon elected to stand upon its demurrer, and final judgment was rendered denying the writ and dismissing the petition. From that judgment the petitioner appealed to the court of appeals. There the judgment of the supreme court of the District was affirmed. It is that judgment of the court of appeals which the plaintiff in error seeks to review in this court.

ALLEGATIONS OF THE PETITION.

The petition sets forth that on the 28th of October, 1898, Clarke, who was a citizen of the United States, was the owner in fee of the southwest quarter of the southwest quarter of section 36, township 37 south, range 5 east, Willamette meridian, in the State of Oregon, containing 40 acres, covered by patent, and that he was also on the 5th of May, 1899, the owner of the east half of the southwest quarter, and the

southwest quarter of the southwest quarter of section 16, township 21 south, of range 7 east, Williamette meridian, in the State of Oregon, one of the tracts containing 40 acres and the other 120 acres, and both covered by patents; that on the 14th of February, 1893, the townships and ranges in which the said lands were situated were, among other lands, by proclamation of the President of the United States, under the forest reservation law, designated as the "Cascade Range Forest Reservation."

That by an act of Congress approved June 4, 1897, it was provided:

> That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. (Rec., pp. 5 and 6.)

This is followed by allegations of the petitioner, which are designed to instruct us in the meaning of the words "vacant land open for settlement," as used in this act,

and also as supposed to be established "by long Congressional, judicial, and departmental usage and interpretation," and which, it is said, from these sources of information, mean "any public lands appearing on the records of the Land Department as lands not taken by an individual," or, as decided in the case of F. A. Hyde (28 Land Decisions, 284, 288), "any public land to which rights may be initiated by settlement under existing laws."

And we are told that the act in itself prescribes no other conditions precedent to selection. (Rec., p. 6.)

The amendatory act of June 6, 1900, is then set forth, and it is simply to the effect—

> That all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed nonmineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof. (*Id.*, p. 6.)

This is followed by another discourse, wherein we are informed by the petitioner, by way of averment,

that by this last-mentioned act Congress limited the class of lands open to selection to "vacant surveyed nonmineral public lands which are subject to homestead entry," and specifically confirmed the construction of the language of the original act of June 4, 1897, and recognized that the words "vacant land open to settlement" mean even more than "vacant surveyed nonmineral public lands which are subject to homestead entry;" and petitioner avers that under the law the lands returned either as agricultural or mineral in character are enterable under the homestead law until the actual discovery of valuable mineral deposits thereon.

It likewise avers that the said act of June 4, 1897, gave the Secretary of the Interior no authority to make regulations in any manner or form respecting the *exchange* of patented lands within the limits of a public forest reserve for vacant land open to settlement, and the said Secretary of the Interior was wholly without authority to make any such regulations or impose any conditions upon a selector, and his authority was and is limited to the exercise of his function of determining the sufficiency of the deeds of relinquishment to the Government, and directing the issuance of patents for the tracts selected; yet, nevertheless, on May 9, 1899 (28 Land Decisions, 521, 523), he wrongfully assumed the authority to approve and promulgate certain instructions addressed to the various local land officers, prescribing as requirements and conditions precedent

to the relinquishment of forest-reserve land the following:

> In all cases relinquishments made in pursuance of said act must be executed, acknowledged, and recorded in the same manner as conveyances of real property are required to be executed, acknowledged, and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance.

And he also approved a certain form of selection in lieu of the land relinquished, which form contained the recital of the contemporaneous submission, among other things, of an affidavit "showing the lands selected to be non-mineral in character and unoccupied;" and the petition thereupon sets forth a copy of that form, in which the applicant does state that he submits with it an affidavit showing the land selected to be non-mineral in character and unoccupied, and he therefore asks that a United States patent issue to him for the tracts thus selected. (Rec., pp. 6 and 7.)

We are then told that Clarke did execute a deed relinquishing certain lands to the United States, which is set forth in favorite terms with our adversaries, as being done "in the desire on his part to accept the offer of exchange made;" that the offer of the United States

made by the act of June 4, 1897, might be taken advantage of by him; and that at the same time at which he made this relinquishment by deed to the United States of the two tracts of land of which he claimed to be the owner within the forest reserve, he caused them to be recorded in the respective counties in which the lands were situated.

We are next referred to the act of March 3, 1883, wherein the registers and receivers of local land offices were required upon application to furnish official information as to what lands appear upon their books as vacant and what as taken; and that Clarke applied to the register and receiver of the Visalia land office on the 14th of December, 1899, for information in regard to vacant lands open to settlement in that district, and was officially informed by said local land officers that the following-described tracts of land, situate in the Visalia land district, were vacant lands, open to settlement, as shown by the tract books and records of said land office, viz: The north half of the southeast quarter of section 4, township 29 south, of range 28 east, Mount Diablo base and meridian, and the south half of the northeast quarter of said section 4, said township and range, and thereupon, on the said 14th day of December, 1899, the said Clarke delivered and surrendered to the said register and receiver of the said United States land office at Visalia, Cal., the said two deeds of conveyance and relinquishment, with abstracts of title showing good titles to said lands in him, the said Clarke, free from incumbrance, and then and

there, in lieu of said patented forest-reserve land, designated and selected the said north half of the southeast quarter and south half of northeast quarter of said section 4, equal in area to said relinquished lands, and as evidence of such selection filed with the said register written declarations of such selection, one for the north half of the southeast quarter and one for the south half of the northeast quarter of said section 4, and though under no obligation so to do, at the request of the said local land officers, *filed with each of said declarations of selection an affidavit* alleging in effect that said lands were vacant lands open to settlement, true copies of which said deeds of relinquishment, abstracts, declarations of selections, and affidavits are filed herewith, marked respectively Exhibits A, B, C, D, E, F, G, and H.

Then we are told that by the delivery and surrender of said deeds Clarke became divested of the title to the said lands, and the title in fee thereto became vested absolutely in the United States, and the United States can divest itself of the title thus acquired only by act of Congress.

It is then alleged that the two tracts of land selected by Clarke were surveyed by the United States surveyor-general for California, and returned and classified by him as agricultural lands, prior to said selections, and at the time of selection by said C. W. Clarke the two tracts of land were shown on the books and records of the Land Department as and being agricultural land, not reserved or otherwise closed to

settlement, but subject to disposition under the land laws of the United States, and especially under the act of June 4, 1897.

The petition then states that at the time of selection by Clarke there was upon the records of the land office no filing, entry, or claim to said selected lands, and the conclusion of law is then drawn that the same were vacant lands, open to settlement.

And the petitioner, still insisting that the land office records are binding upon the United States and the Land Department thereof, as to the character of the lands, yet further avers that at the time of the said selection by said Clarke there had been no discovery of mineral on said lands, and no mineral was known to exist therein, and the same were in law and in fact agricultural lands, and no valid or legal claim to the same had then or theretofore been initiated; that the United States then were the sole and exclusive possessors and occupiers of the same, as part of the vacant public land open to settlement. (*Id.*, p. 9.)

We are next informed that by the acts of Clarke he effected and perfected a valid and binding exchange of his said patented lands for the lands so selected, exchanging title for title, possession for possession, occupancy for occupancy, and became the owner of said selected lands with general warranty of title from the United States and entitled to patents therefor.

There then follows a citation of the decisions made by the Department, and there is a quotation made from one of them which is supposed by the petitioner

to be in some way or other of great importance to his right, and, after this excerpt from the opinion in the McDonald case, and as also in the case of *Clarke* v. *The Northern Pacific Railway Company*, the petitioner next avers that, by the act of January 27, 1898, it was provided that the register and receiver for each land district "shall have charge of and attend to the sale of public and Indian lands within their respective districts," and, as *conclusions of its own*, that, upon the delivery and surrender of the said deeds of relinquishment and the filing of the said declarations of selections, as aforesaid, and the further examination of the records by the receiver and register, by virtue of the original jurisdiction conferred upon them by the act of January 27, 1898, those officers then and there accepted on behalf of the United States the said deeds of relinquishment, and the said declarations of selections, and appended to each of said declarations a certificate to the effect that the lands selected were free from conflict, and that there was no adverse filing or claim of entry thereto (Rec., p. 10), and that the claim of Clarke was then entered upon the records and tract books of their office as taken by him.

Then we are told that, notwithstanding all this, the Land Department, without authority of law, required Clarke to publish a notice of his said selection for the period of sixty days, and to pay for the same, and that the register of the land office, under dates respectively of January 21 and January 22, 1900, forwarded all the papers to the Commissioner of the General Land Office,

accompanied by letters certifying a second time that the records of his office showed the lands to be free from conflict and subject to such selection, and reporting that publication had been ordered under circular of the General Land Office of December 18, 1899, which was subsequent in date to the selection by Clarke, and true copies of said letters are filed herewith, marked, respectively, "Exhibits I and J."

Then Clarke, though it is said that he was not under legal obligation so to do, did make the required publication of notice; and thereupon, on February 6, 1900, the Kern Oil Company filed in the said local land office a protest against both of said selections, with accompanying affidavits, a true copy of which is filed with the petition and marked "Exhibit K."

On February 12, J. F. Elwood and others filed in said local land office protests against said selections, with accompanying affidavits, true copies of which are filed herewith, marked, respectively, "Exhibits L and M."

All of these were forwarded to the General Land Office.

We are then told that these protests were insufficient in form and substance to constitute an issue as to whether or not said lands selected, as aforesaid, by said Clarke were vacant lands, open to settlement at the time of such selections, and that said protestants, by reason of said nondiscovery of minerals in the said lands, are wholly without standing as adverse claimants, under the law and practice of the Land Depart-

ment, with more concerning the insufficiency of these protests.

Then follow allegations of the transfer by Clarke to Alexander, and by Alexander to the petitioner, and of the rights which passed thereby. (Rec., pp. 11 and 12.)

In the fourteenth paragraph of the petition the protestants, who were claiming the lands under the mining laws of the United States, are assailed as mere pretended explorers for minerals and so forth, and it is said that they had made no discovery, and that the provisions of section 2335 of the Revised Statutes contemplate hearings only when the adverse party shows color of title and right to the land. (*Id.*, p. 12.)

Then follows the averment showing that on December 18, 1900, the Commissioner of the General Land Office consolidated the two selections, considered them as one case, and rendered a decision in the controversy thus made between them, which decision is printed in the transcript herein and will speak for itself as to what it determines. (Rec., pp. 59–71.) But the result of it was that the Commissioner did order a hearing to be had for the purpose of determining the questions in controversy, namely, whether this was mineral land, whether these parties had made a location of it, and were then engaged in the operation of mines thereon, and were in the occupancy thereof. FROM THIS DECISION THE PETITIONER APPEALED TO THE SECRETARY OF THE INTERIOR (see pp. 12, 13); and he, after hearing the parties, set aside the order of the Commissioner directing the hearing, but at the same time rejected the applications of Clarke. A motion

was subsequently made for a rehearing of the matter, and it was then again argued before the Assistant Attorney-General for the Department of the Interior, and the decision again made rejecting these selections, for reasons which are set forth in the opinion.

(For the remainder of the petition see pp. 12 to 20.)

THE EXHIBITS.

There then follow these various exhibits. In the affidavits of nonoccupancy and nonmineral character of the lands submitted by Clarke it will be seen that the affidavits do not conform to the requirements of the regulations. Mr. Barion, who makes the affidavits, says that the tract is agricultural in character, and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States, but he adds:

> This affidavit is made upon the evidence found on the surface of the ground. *Deponent does not undertake to express any opinion as to what may be under the ground.*

And he also says that no portion of the land was worked for minerals during any part of the year by any person or persons. (Rec., pp. 23, 24.)

The other affidavit is of the same character. (Rec., pp. 24, 25.)

The opinion of the honorable Commissioner shows what changes the affidavit prescribed by the Department underwent in these selections. Thus the words "THAT THERE IS NO OCCUPATION OF SAID LANDS ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF

JUNE 24, 1897, BY ——," being embraced in brackets (p. 60 of transcript), were ERASED, and the words, "*this affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground*," were interlineations or interpolations made by the affidavit maker.

And further along the other words in brackets, "THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE," were erased. (Rec., p. 60.)

Returning now to the facts as they appear. On January 21, 1900, the register of the land office at Visalia transmitted the applications of Clarke to the honorable Commissioner of the General Land Office, together with the affidavit of Barion, and also the deeds from Clarke and wife to the two tracts of land, and with his own certificate that the records of his office showed the land selected to be free from conflict and subject to such selection. He also noted the fact that publication had been ordered under the circular of December 18, 1899. (Rec., pp. 25, 26.)

PROTESTS AGAINST THE SELECTION.

After this publication had been made, the Kern Oil Company appeared before the register and receiver at the Visalia land office and presented their protest against the issuance of a patent to Clarke, and they set forth in that protest that on or about the 11th of June, 1899, J. F. Elwood and others, naming them, citizens of the United States and over the age of 21 years, as

an association of eight persons, located certain placer mining claims under the laws of the United States, which claims were known as the "Fossil," being the northeast quarter of section 4, and "Junebug," being the north half of the southeast quarter of said section, all in township 29 south, range 28 east, M. D. B. and M., and stated in the protest that in making this location the locators definitely marked the boundaries of the said placer mining claims and each of them, so that the lines could be readily traced by anyone, and set corner monuments and intermediate stakes between the corner monuments, so that any person going upon the ground could readily trace the lines, and also posted notices of location on the claims and each of them, which contained a description of the claims, and the names of the locators, and date of location, and which notice was recorded in the office of the county recorder of Kern County. The protestants further stated that at the time of making the said location the locators had made such discovery of minerals as to entitle them to make the location, and that they entered into the possession of the claims, and each of them, and were developing the same, and sunk wells upon them, and each of them, and in sinking said wells they discovered petroleum in paying quantities upon each of said claims; that the well on the "Junebug" was sunk to the depth of 120 feet, and on the "Fossil" 130 feet, and were prospect wells, sunk for the purpose of prospecting the said claims; that immediately adjoining this land, and within 75 feet from the west line thereof,

an oil well was sunk by the owner of the premises upon which the same was bored, and in sinking the said well the oil sands and strata containing the petroleum were found at about the depth of 120 feet; that said oil sands continue to a depth at the present time of 380 feet, and that the product of said well, and the yield thereof, is at least 25 to 30 barrels of potroleum per day; that on the north of the said "Fossil" placer mining claim, and within 50 feet of the north boundary thereof, a well was sunk by the West Shore Oil Company, a corporation, and that the said company found oil sands at a depth of about 100 feet, and that it was a producer of petroleum, and at a depth of 450 feet the oil well would and was calculated to produce petroleum of at least 20 barrels per day; that the strata of oil sands underlying the placer mining claims set forth were flat and horizontal, and what is known to miners as of blanket formation. The Kern Oil Company then alleged that it had succeeded to the rights of the locators and had paid large sums of money for the placer mining claims, which purchase was made for the petroleum therein contained and for no other purpose, and that the lands were of the value of $250 per acre for petroleum, and had no value for anything else; that the lands were not susceptible of irrigation, being above any possible ditch level that might be brought from the Kern River, which was the only means of irrigating or of obtaining water to irrigate said lands; that the lands were precipitous and steep, with deep ravines and gulches running through the same, and if

water could be brought upon the land the same could not be retained even for practical irrigation purposes, and that the lands were sandy, desert lands, with no vegetation growing thereon. It stated that it had been in the possession of the said mining claims, and each of them, namely, the west half of each of them, and is now, and has been for a long time past, the owner thereof; that the protestants had expended considerable money in developing the said claims, and the premises so owned by them, for the petroleum therein contained, and to show the actual worth of the lands as petroleum land, and that the same lies in one of the greatest petroleum belts in the State of California; that the land selected by Clarke in each of his applications embraced lands then owned and possessed by the Kern Oil Company, and that Clarke at the time of making his said application well knew the mineral character of the land, and could have known the same if he had gone upon the premises, and notwithstanding this he selected the same as agricultural lands, and caused one Barion to make an affidavit setting forth certain facts but striking out of said affidavit many material facts required by the Department of the Interior to be made in selecting said lands; that at the time he made this affidavit he stated that no mining operations were being carried on upon the said land, or any part thereof, when, in truth, on the east half of the Fossil placer mining claim and on the south half of the northeast quarter of said section 4, there were derricks, machinery, tools, buildings, and appliances upon the

said placer mining claims of the value of at least $5,000, and all of which he well knew, if he went upon the land, as said machinery and buildings were upon the highest point upon the said land; that Clarke did not and could not have made application for these lands for agricultural purposes except for the purpose of obtaining or endeavoring to obtain said mineral lands in violation of the rights given to settlers under the act of June 4, 1897; that said lands had no value as agricultural lands, and that all of these things were known to Clarke, and that application was made for the purpose of obtaining the mineral location and mining claims owned by this protestant in violation of the laws of the United States prohibiting the selection of mineral lands under the act of June 4, 1897, all of which matters and things Clarke must have known if he went on the premises, and the protestant attached thereto the affidavits of Keith, Hoxie, Knowles, Phelps, Lindsay, and Elwood, showing the character of these lands, and made them a part of the protest. (Rec., pp. 26–29.)

This protest was sworn to by Bender, and a copy of the notice of location was annexed (Rec., pp. 30–32), and a certificate of the recorder attached to the said notice (Rec., p. 31), and then follows the other notice locating the Junebug claim (Rec., pp. 31, 32). Next follows the affidavit of Keith, to which affidavit was attached a plat showing the location of the petroleum wells, which, however, does not appear to be contained in this transcript. In this affidavit he tells of the wells

that were bored all around this land, in all of which oil was found in paying quantities, and that he was well acquainted with the placer mining claims known as the Fossil and the Junebug, and states how these wells which he bored were situated with reference to those mining claims. (Rec., pp. 32, 33.)

Hoxie was one of the locators of both the Junebug and the Fossil placer mining claims, and he showed what was done with reference to marking the boundaries of the location and posting the notices and recording the same, and that at the time of making locations they had made the discovery of mineral and petroleum within the boundary lines of said locations, which discovery was such as to lead them to continue to sink wells upon said locations and each of them; and they sank a well on the Junebug during the month of June and the early part of July, 1899, to a depth of 122 feet, and in sinking said wells found petroleum and penetrated the oil sand and strata containing the bituminous matters and found petroleum of extraordinary richness; that this well was bored and sunk at the expense of said locators, and that the said locators and their successors in interest have been in possession of said placer mining claims and each of them ever since the date of location. (Rec., p. 34.)

Now, it will be noticed that both of Clarke's applications bore date and were presented on the 13th day of December, 1899 (Rec., pp. 21, 22), **and the well that was sunk on this Junebug claim was sunk in June and the early part of July of the same year, five months before any application of Clarke to select these lands.**

Elwood was also one of the locators of both of these claims, the Junebug and the Fossil, and on the Junebug he caused the well to be bored, beginning in the latter part of June, 1899, and completed during the month of July of that year. That in boring said well petroleum in large quantities was found and penetrated at a depth of 122 feet and showed the lands to be valuable as petroleum lands. He also testifies that he and his grantees have been in possession of said mining claims, working and developing them ever since the date of the location, on the 11th of June, 1899. (Rec., pp. 35, 36.)

Lindsay, also one of the locators, attests the same facts. (Rec., pp. 36, 37.)

Phelps, who has been in petroleum mining and examining mines in petroleum for twenty years, said that he had examined the lands within these claims, and shows what was discoverable there on the surface, and that it was of such character as would lead a petroleum miner to make further development of the claim. He was also on the Junebug claim in June, 1899, and found that a well was then being put down, and examined the débris of sand and oil as being taken out of the said well, and that it showed that oil was found in considerable quantities. He was there again on the Fossil placer mining claim in July, 1899, and found persons engaged in the operation of drilling for oil on the said placer mining claim, and that what was there found in the well was of the same character. (Rec., pp. 37 to 39.)

Knowles was the manager of the West Shore Oil Company and knew the Fossil mining claim; that he had sunk a well on the southeast quarter of section 32 that would produce not less than 25 barrels of petroleum a day, and that the shale and sand containing bituminous matters and residuum of petroleum found on the Fossil was of the same character as that found on the southeast quarter of section 32, and that the strata is about 200 feet in thickness, and at a depth of 450 feet continues to grow richer, as further depth is obtained, and that he did not know the full depth of the oil strata at the present time, but, as before stated, that in boring he had penetrated the oil sands for about 200 feet in thickness. He shows that this formation is what is known as the "blanket strata of oil sands." (Rec., pp. 39, 40.)

A protest was filed by Elwood and others (Rec., pp. 30–44), and which was accompanied by affidavits of several different persons. (Rec., pp. 44–47.)

Another protest was filed by the same parties against the application of Clarke to enter the south half of the northeast quarter of section 4, township 29 south, range 28 east, M. D. B. and M., which was also accompanied with affidavits as to the character of the lands, both for agricultural and mineral purposes, and what these mining locators had done with reference to making the location and developing and working the mines therein (Rec., pp. 47–55); and, without further stating the contents of these affidavits and protests, which are all substantially to the same effect, it is sufficient to say that they show that a valid mining location

had been made of these two mining claims, the Fossil and the Junebug, upon the lands which were embraced in the applications which Clarke made for the selection of these lands in lieu of the forest reservation lands. That the locations had been made on June 11, 1899, by posting the notices and marking the boundaries; that they discovered upon the surface of the ground at that time the evidences of their value in petroleum sufficient to induce them to expend their money in developing the same, and that they did spend it; and that they had demonstrated that their value for petroleum was vastly in excess of anything else, at least as early as the middle of July, 1899, more than four months before these applications of Clarke were made. They say, moreover, that from the time of the location on June 11, 1899, until the time the affidavits were made, the original locators and their successors in interest had been in continual possession and occupation of the lands, and had been engaged in developing them and mining the same, and had expended large amounts upon machinery and in working thereon, and that these things were done on the very highest point upon these lands and were perfectly notorious and openly visible to all who went upon the lands or in their vicinity. Notwithstanding this showing, a motion was made to dismiss these protests by this claimant, Clarke (Rec., pp. 55–57), which was denied by the Commissioner, and a hearing ordered. The motion to dismiss, as well as the petition in this case, discloses the grounds upon which the claim of Clarke rests.

Notwithstanding some arguments and statements that seemed designed rather to evade the logical conclusion from their position, it nevertheless appears that the position of our adversaries is, baldly, that nothing can stand in the way of a selection under the forest reservation lieu land act except something that appears on the land-office records; and that when Clarke went to the land office at Visalia and there found that there was no claim of record to these lands on the books of the office in that district, it did for all purposes appear that these lands were vacant and open to selection, and that when he presented the deeds, abstracts, and what they call selections, and the register and receiver took these papers from his hands and entered on the record the fact that he had made such claim, that ended the matter, and the Land Department had nothing whatever to do except to deliver him a patent at the earliest practicable moment.

THE RETURN OF THE SECRETARY.

But to this petition and the position taken by the petitioner the respondent made return, in which he gave a complete history of the proceedings before the Land Department and the grounds of his action. The return shows that the applications were made substantially as alleged in the petition, and that there were presented therewith affidavits *purporting* to be the non-mineral and non-occupancy affidavits prescribed by the Department. The return sets forth, then, the affidavit which Clarke actually filed and calls attention to the particulars wherein it differed from the form which had been

prescribed by the Department. (Rec., pp. 121–123.) As will be seen, immediately after the statement that the said tract applied for is "agricultural in character and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States," the affiant interpolated the words "*This affidavit is made from the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*" It also appears that the applicant erased from the affidavit the words "THAT THERE IS NO OCCUPATION OF SAID LAND ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF JUNE 4, 1897," and the words "THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE."

It was then alleged by the respondent—

> that each and every of the allegations erased and omitted from the said affidavit by said Clarke were necessary and indispensable allegations for the purpose of enabling the said Clarke to select the lands in lieu of the land proposed to be relinquished, for the reason that if the said lands were occupied adversely to the selection thereof under the act of June 4, 1897, by any person or persons, or if any portion of said land was claimed for mining purposes under the local customs or rules of miners or otherwise, which said local customs or rules of miners are by act of Congress made a part of the mining laws of the United States, then said lands were not vacant lands open to settlement

within the intent and meaning of the act of June 4, 1897 (Rec., pp. 122–124).

He further alleged that—

> the words added to the affidavit of Clarke negatived and destroyed the force and effect of the averment of the affidavit as to the supposed known character of the land as nonmineral and as not being subject to entry under the coal and mineral land laws of the United States (Rec., p. 124)

The honorable Secretary then refers to the protest of the Kern Oil Company and the general facts contained therein and a separate protest filed on the 12th of February, 1900, of Elwood and others, in which they allege possession and occupancy of the land for oil and mining purposes substantially to the same effect. (Rec., p. 124.)

It is then stated that the matter in contest came on for hearing before the Commissioner of the General Land Office, "who, after a full, fair, and impartial hearing of the applications and affidavits in support thereof, decided that the allegations made in the protest should be investigated at the hearing, to be conducted in accordance with the following principles," and then sets forth the principles (*vide*, p. 124).

From this decision the appeal was taken to the Secretary of the Interior, and it was there fully, fairly, and impartially heard and duly and deliberately considered, and all of the applications, affidavits, briefs, printed and oral arguments made to and before him and the Assistant Attorney-General for the Interior

Department, acting in that behalf, were duly considered, and on the 25th of April, 1901, it was formally and officially decided that, inasmuch as the selector, Clarke, in making application for said lands, had not by proper averments or any averments shown or set forth that the lands were at the time of selection vacant lands, open to settlement, within the intent and meaning of the said act of June 4, 1897, of which fact of vacancy, it is charged as a matter of fact, the said selector was and the Land Department was not and could not have been cognizant, but so to set forth and show had wholly failed and neglected and willfully refused; therefore the said selector had not in and by his applications and affidavits shown himself entitled, as of the date of the said attempted selection, to select the lands or to obtain a patent therefor (Rec., p. 125).

Furthermore, that inasmuch as it then appeared to the honorable Secretary in proof and was admitted, and while the said lands so remained the property of the United States and opened to exploration, etc., and before the said selector, Clarke, had by proper averments shown that the lands were subject to selection, or that he was entitled to select the same as vacant lands open to settlement, the protestants had gone into possession and occupancy thereof and had made discovery of petroleum therein, and were claiming, working, and developing the same under certain placer mining locations, under the laws of the United States, and, as it then appeared and was admitted that the lands were, in point of fact, "valuable for mines and

minerals and worthless for agricultural purposes," that therefore the supposed selection of Clarke could never be made good by any proof that could thereafter be established, the order of the Commissioner directing a hearing was vacated and Clarke's selection rejected (Rec., pp. 124, 125.)

The return also recites that a motion for a review was made, which motion was fully argued before the Secretary orally, and again by him duly considered and denied and the former decision adhered to. He denies that he had illegally or arbitrarily held or decided any matter or thing whatsoever in respect to the application for selection. He claims that there was imposed upon him by the laws of the United States the duty to construe the acts governing the disposition of the public lands of the United States and applying the same to cases coming before him, and that in pursuance of those duties he was required to construe and apply the terms of the act of Congress of June 4, 1897, and that he did construe it, and all this after the parties had been fully heard. (Rec., pp. 126, 127.)

In addition to this return, we invite the attention of the court to the opinions delivered by the Secretary of the Interior in this case, made exhibits to the return as well as to the petition, the first of which will be found in the Record, pages 78 to 97, and second, the opinion on the motion for a review, in the Record, pages 105 to 120.

Subsequent to the original decision, which was made on April 25, 1901, to wit, on the 29th day of

May, 1901, the applicant made, or caused Barion to make, another affidavit, purporting to be an affidavit of nonoccupancy, and which affidavit appears to have been filed in the Land Department on the 5th day of June, 1901. (Rec., p. 104.)

This affidavit, made, as it was, nearly a year and a half after the application for a patent and after the decision in the cause, could not very well have established a right, if none had been established before; but we call particular attention to these facts: This affidavit was intended to heal the defect in the former affidavit in regard to the nonoccupancy. That portion of the affidavit which stated that the lands were not occupied was, as we have before stated, stricken out of the first affidavit. The same man now makes oath that said land was upon such date unoccupied, and that there was not then any occupation adverse to the selection made by Clarke under the act of June 4, 1897. But at the time this second affidavit was made there were already on file these protests and the affidavits in support of them, each and every one of which stated, not in general terms that the land was occupied, but exactly what had been done upon it.

Thus, in the Kern Oil Company's protest, which was duly verified, it was averred, among other things, that at the time Barion stated that no mining operations were being carried on upon said land or any part thereof, the truth was that on the east half of said Fossil placer mining claim and on the south half of the northeast quarter of said section 4, there were derricks,

machinery, tools, buildings, and appliances upon said placer mining claims of the value of at least $5,000, all of which matters and things said Barion well knew, if he went upon the land, as said machinery and buildings were upon the highest point upon said lands. (Rec., pp. 28–29.)

Keith swears to the boring of the wells upon those lands, and also says that they were bored under his supervision and were high upon the hills (Rec., p. 33); and all of the other affidavits treating of that subject showed the same thing.

Now, in Barion's supplemental affidavit he does not contradict any of these things or deny a single fact which they have stated, except in the general terms of nonoccupancy, from which it must be apparent that he was *simply swearing to the correctness of the legal conclusions* of the petitioner, that lands were not occupied unless they had been entered on the tract books of the local office.

Upon these facts it is submitted that the decision of the Land Department assailed here is correct, and that whether correct or not, it was the determination of the controversy by a special tribunal of competent jurisdiction, and its judgment can not be controlled by a writ of mandamus, whether right or wrong.

POINTS AND AUTHORITIES.

FIRST POINT.

The Land Department is a special tribunal, with judicial functions, having jurisdiction over all proceedings for the acquisition of the public lands, and in the exercise of that jurisdiction does and must determine all questions upon which depends the right of the applicant to a patent.

Under the power granted by the Constitution to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, care, and disposition of the public lands.

United States ex rel. McBride v. *Schurz*, 102 U. S., 378, 395, 396.

Barden v. *N. P. R. R.*, 154 U. S., 288, 326, 329.

In *United States* v. *Winona and St. P. R. R. Co.* (67 Fed., 948) the court, following many previous decisions, said that the Secretary of the Interior is charged with the supervision of the public business of the United States relating to the public lands. After showing that the Land Department of the United

States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitute a special tribunal under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them, the court points out that when a claim under a grant to a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant; whether or not it has so far complied with its conditions that it is entitled to its benefit; whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. Again pointing out that when a claim is made under the homestead or preemption laws for a portion of the public domain that is subject to its disposition, the same tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws; whether or not the land claimed was subject to preemption or to entry for a homestead, and whether the claimant has so complied with the requirements of those laws as to entitle him to the title to the land, the court proceeds to say:

> Similar questions must be heard and determined by that department whenever any portion of the public lands, subject to disposition by that tribunal, is sold or otherwise disposed of in any way. In every case there must, in the

> nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land under the act of Congress. A survey or patent is record evidence of the judgment of this tribunal, and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department, it is, like the judgments of other special tribunals, vested with judicial powers, *impervious to collateral attack*. (67 Fed., 965–966.)

The same principles there decided have been recognized in innumerable cases; among others in—

> *Lewis* v. *Shaw*, 57 Fed., 516–518.
> *Chapman* v. *Quinn*, 66 Cal., 266.
> *Poppe* v. *Athern*, 42 Cal., 607.
> *Germania Iron Co.* v. *James*, 89 Fed., 811, 813–818.
> *Hoover* v. *Salling*, 102 Fed., 716.
> *James* v. *Germania Iron Co.*, 107 Fed., 597, 600–602.

In *Barden* v. *Northern Pacific R. R. Co.* (154 U. S., 288), Mr. Justice Field said:

> The determination of the character of the land granted by Congress in any case, whether agricultural or mineral, swamp or timber land, is placed in the officers of the Land Department, whose action is subject to revision by the Commissioner of the General Land Office, and on appeal from him to the Secretary of the Interior. Under their direction and supervision

the actual character of the land may be determined and fully established.

154 U. S., 320–'32.

See further *id.*, 326–331.

See also *Knight* v. *U. S. Land Asso.*, 142 U. S., 161, 177; 35 L. Ed., 934, 980.

In *King* v. *McAndrews* (111 Fed., 860), a decision in the circuit court of appeals of the eighth circuit, it is again repeated that the Land Department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitute a special tribunal, vested with judicial power to determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them. A patent of land within its jurisdiction by the Land Department is a judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment, and when such a patent to lands within the jurisdiction of the Department is issued, it is like the judgment of other judicial tribunals, impervious to collateral attack (*Id.*, 863).

> The test of the jurisdiction of this tribunal is the true answer to the question, Had the Department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the Land Department had jurisdiction of the case, and the patent which evidences its decision

> conveys the legal title, and *is impervious to collateral attack*. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.
>
> Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which Congress has made no provision is not intrusted to the disposition of the Land Department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law.
>
> But land which the Department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and dispose of in accordance with its decisions, is within its jurisdiction, and its patents of such land convey title to it, and is impervious to collateral attacks, whether its decision is right or wrong. * * *

(The stars stand for the cases cited.)

The last case cited after this passage is *Barden* v. *R. R. Co.* (154 U. S., 288, 327; 38 L., 992, 1001). Judge Sanborn, continuing, says:

> In the case last cited the Supreme Court said: "It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the distribution of any

portion of the public land, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

And, continuing, he said:

> The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. * * * Hence a patent evidencing an erroneous decision of **a question of law or a mistaken determination of an issue of facts**, which the Department was vested with the power and charged with the duty to decide, is as impervious to attack as one which is the result of correct conclusion.
>
> The remedy for an error of law in the action of the Department regarding the title of land entrusted to its disposition is by a direct proceeding by a bill in equity to correct it. * * *
>
> The aggrieved party has a like remedy for the wrongful issue of a patent upon a misapprehension of the facts, which is induced by fraud or gross mistake.
>
> These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendant seem to be impressed with the view that every decision by the Land Department of the many grave and complicated issues which

condition the rightful issue of a patent is a *mere ministerial act*, open to collateral attack for every error of law into which the officers of that Department may fall, in every action at law in which the title under the patent is involved. * * * Such is not the law. The decisions of that Department are *judicial acts*. The patents it issues are the judgment of a *quasi-judicial tribunal*. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or mistakes of fact *as the judgment of the courts*, and all cases are within the jurisdiction of this Department in which Congress has entrusted the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.

The real question in this case, therefore, Was this determination of the rights of the claimants to the land and the issue of a patent in consonance with that decision intrusted to this Department? The contention of the counsel for the defendants is that it was not, because the land was within the limits of an incorporated village when it was first entered by the patentee. The record of the trial of the case does not disclose the facts which conditioned the decision and judgment of the Department, which the patent evidences, that King was entitled to the land. But the general rule is that the disposition of the public lands of the United States is intrusted to this Department, and the patent itself is presumptive evidence both that the Department had the jurisdiction to decide whether or not the patentee was entitled to it, and that its decision of that question

was right. It follows that, if there might have been any state of facts which would have given the Department jurisdiction of this case and the power to issue patents of this land under the acts of Congress, the presumption is that such a state of facts existed, and that the Department had jurisdiction of the case. Upon this subject the Supreme Court said in *Refining Co.* v. *Kent*, 104 U. S., at page 646, 26 L. Ed. at page 878, that a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. (111 Fed., 863–866.)

See also—

Northern Pacific R. R. Company v. *Cannon*, 54 Fed., 252.

Steel v. *Refining Co.*, 106 U. S., 447.

Barden v. *Northern Pacific Railroad Company*, 154 U. S., 288.

St. Louis Smelting and Refining Co., v. *Kemp*, 104 U. S., 651.

SECOND POINT.

This jurisdiction of the Land Department continues until, by the issuance of a patent or by some action of the Land Department which acts of Congress have made the equivalent of a patent, the legal title has passed out of the United States.

In *United Sates* v. *Schurz* it was said:

Congress has also enacted a system of laws by which rights to those lands may be acquired and the title of the Government conveyed to

> the citizens. This court has in strong language upheld the doctrine that so long as the *legal title* to these lands remains in the United States, and the proceedings for acquiring them were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.
>
> *United States* v. *Schurz*, 102 U. S., 378–396.
>
> *Brown* v. *Hitchcock*, 173 U. S., 473, 478.

Now, the legal title to the public lands, the disposition of which has been confided to the Land Department, passes out of the United States, and the corresponding jurisdiction of the Land Department over them ends, only upon the happening of one of the following events:

1. When a patent issued under the seal of the United States and signed by the President has been delivered to and accepted by the party applicant. (*Moore* v. *Robbins*, 96 U. S., 530, 533.)

2. When, upon a decision of the Land Department that the party is entitled to a patent, the patent is duly executed and recorded, though not delivered, such record is a solemn public act of the Government and operates as an assurance by matter of record to vest the legal title in the applicant without delivery. (*United States* v. *Schurz*, 102 U. S., 376, 396–399.)

3. When by the terms of an act of Congress lands are granted *in presenti* under a general description, but to be thereafter identified, and the Land Department has *on its records* identified the lands by approval noted on the plat or otherwise, such identification of

record operates to complete the vesting of title under the express grant of the act. (*Noble* v. *The Union River Logging Co.*, 147 U. S., 165, 176, 177.)

In all of these cases it will be found that either a patent or some matter of record equivalent to a patent has been issued or entered by virtue of a decision of the Land Department itself. The first case is the normal one. In the two latter cases the action of the Department, being the equivalent of a patent, has vested in the applicants a legal title, and any attempt to deal with it afterwards by way of rescinding the patent or canceling the record, being clearly beyond the scope of the Department's authority, has been held to be controllable by mandamus or injunction.

> *United States* v. *Schurz*, 102 U. S., 278–297, 299.
>
> *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 176–177.

See these cases explained in *New Orleans* v. *Payne* (147 U. S., 261, 263–264).

But no case has been found, and no case exists, where a court has interfered to command the action of the Department in the course of the procedure to obtain a patent, nor does any power so to interfere exist until by the action of the Department itself the legal title has passed out of the United States and the jurisdiction to dispose of the land has gone with the legal title.

> The power of the Department to inquire into the extent and validity of the rights claimed

against the Government does not cease until the legal title has passed. *Michigan Land & L. Co.* v. *Rust*, 168 U. S., 589, 593.

And no case can be found in which it has been held that an applicant in any proceeding pending before the Land Department and within its jurisdiction can by any mere action of his own, independently of the adjudicative action of the Land Department, divest the title of the United States and vest title in himself.

In a word, the only power which a court has to control the action of the Land Department by the collateral process of mandamus is to compel it to *deliver the evidence* of the Department's own decision whenever it is arbitrarily or capriciously withheld. And the only power in any court to control the action of the Land Department by the process of injunction is to prevent it from disturbing, unsettling, or divesting a legal title which by some previous action of its own has already vested in the citizen. (*Warner Valley Stock Co.* v. *Smith*, 9 App. D. C., 187.)

In addition to the above cases cited to support the proposition that the jurisdiction of the Land Department continues until a patent has been issued or action taken equivalent to a patent, we invite attention to the following:

Knight v. *U. S. Land Asso.*, 142 U. S., 161.
Diller v. *Hawley*, 81 Fed., 651.
Hawley v. *Diller*, 178 U. S., 476; 44 L., 1167.
Mich. Land & Lumber Co. v. *Rust*, 168 U. S., 589, 592–593.

THIRD POINT.

Inasmuch as the Land Department has not in this case, by any action or decision, divested the title of the United States, or vested title in the applicant, and thus put an end to its own jurisdiction, the issuance and delivery of a patent as evidence of a title has not been reduced to a mere ministerial duty.

It can not be disputed that the Land Department has plenary jurisdiction over the administration of the lieu land act of June 4, 1897.

In order to give jurisdiction to the Land Department, it is well settled that it is not at all necessary that the act of Congress providing for the disposition of a particular part of the public domain should expressly confer their jurisdiction. On the contrary, unless the act of Congress does specifically provide for some other tribunal to which is committed the administration of the particular law, the jurisdiction inheres in the Land Department. This was explicitly so decided in *Catholic Bishop of Nesqually* v. *Gibbons*, 158 U. S., 155.

1. *The lieu land act of June 4, 1897, contemplates the issuance of a patent, and no selection, therefore, is perfected until the actual issuance of a patent.*

Applying the doctrine stated in the second point of this brief, the case of the *Michigan Land and Lumber Co.* v. *Rust* (168 U. S., 589, 592, 593), shows that the instrument which usually operates to transfer a title from the United States is a patent, but that such effect may be, however, and sometimes is, given to some other act which is made the equivalent of the patent;

but, always where the granting act provides for the issuance of a patent, the rule is that nothing can become the equivalent of it, and that the legal title remains in the Government until the patent itself issues.

Now this lieu land act of June 4, 1897, does not make anything less than a patent the equivalent of it. On the contrary, it manifestly and expressly provides for patent, and hence the jurisdiction of the Land Department not only exists but continues until a patent is issued.

Orchard v. *Alexander*, 157 U. S., 372, 377.
Brown v. *Hitchcock*, 173 U. S., 473, 478.

Where an act of Congress provides for the disposition of the public lands in any particular way, and the lands to be purchased are to be selected by the purchaser, whether it be a State, a railroad company, or an individual, the selection is not made until it is approved. (*Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496.)

In that case it was held that when Congress had prescribed the conditions upon which a portion of the public domain might be alienated, and provided that upon the performance of the conditions a patent should issue to the donee or purchaser, and such conditions had been complied with, and nothing remains but to issue the patent, then the donee or purchaser is to be treated as the beneficial owner of the land. But when the official executive act prescribed by law remains to be done before the tract can be distinctly defined, and before a patent can issue, the legal and equitable

titles remain in the United States. Furthermore, it was held that the act of the Secretary of the Interior approving the selections of indemnity lands by a railroad land grant company to supply deficiencies in selection within the place limits is judicial, and until that is done the company has no equitable right in the selected tracts, and the rule was not affected by the fact that such a refusal was given under a mistake of law. In that case the *Sioux City and St. Paul R. R. Company* v. *Chicago, etc., R. R. Company* (117 U. S., 406, 408) was cited, and from that case the following passage was quoted:

> No title to indemnity land was vested until a selection was made by which they were pointed out and ascertained, and the selection made, approved by the Secretary of the Interior. (133 U. S., 513.)

On the same page the court said:

> The uniform language is that no title to indemnity lands becomes vested in any company or in the State until the selections are made, and they are not considered as made until they have been approved, as provided by the statute, by the Secretary of the Interior. (See pp. 511–514.)

The principle of these cases is applied to all of the laws for the disposition of the public lands. **The authorities are numerous and uniform that under every kind of law for the disposition of the public lands no title, legal or equitable, vests until the application is passed upon by this special tribunal and it has been**

determined that the party making the application possesses the qualifications and has done the things which the law requires of him and has paid the purchase price; even then the title is equitable merely and the jurisdiction of the Land Department is not yet ousted over the subject-matter.

And the acts of the local office, where they are authorized to permit an entry at all, are subject to revision, whether an appeal is taken or not.

Hosmer v. *Wallace*, 47 Cal., 461.

Stimson Land Co. v. *Rawson*, 62 Fed., 426.

When the pre-emption or homestead claimant has made final proof and payment and those proofs have been approved by the Commissioner of the General Land Office, the equitable title vests, and it is held to vest when the proof and payment are made, provided the lands were subject to selection under those laws; but in all these cases the proof is sent to the office of the Commissioner of the General Land Office, and if upon the face of those proofs he is of the opinion that the lands are not subject to such selection, or that the party was not qualified, he has the power to reject it, and frequently does so, and no title vests, legal or equitable. When the final proof and payment is established, while it may be attacked in the Land Department for fraud, yet in the absence of such an attack the matter is ended, and this because the event which constitutes the estoppel and gives conclusive effect to the proceedings has occurred. The Land Department has made the investigation and given its decision, and, having jurisdiction over the subject-matter, it has the

same force and effect that any other judgment of a tribunal of competent jurisdiction has in any other case. But until such final adjudication has been made a pre-emptioner or homestead claim might be and will be canceled upon proof of the mineral character of the land.

Coleman v. *McKenzie*, 28 L. D., 349.
Santa Clara Mining Association v. *Scorsur*, 4 L. D., 104.
Hooper v. *Ferguson*, 2 L. D., 712.

The same is true of railroad lands.

Zadig v. *Central P. R. R. Co.*, 20 L. D., 26.
Barnstetter v. *C. P. R. R. Co.*, 21 L. D., 464.
Stinchfield v *Pierce*, 19 L. D., 12.
Jones v. *Marsh*, 15 L. D., 196.
Royal K. Placer, 13 L. D., 86, 89.
United States v. *Iron and Silver Min. Co.*, 128 U S., 673.
C. P. R. R. Co. v. *Valentine*, 11 L. D., 328.

The same is true with reference to indemnity school sections.

Swamp v. *State of California*, 27 L. D., 411.
McQuiddy et al. v. *State of California*, 29 L. D., 181.
Walker v. *Southern Pac. R. R. Co.*, 24 L. D., 172.
Herral's case, 92 L. D., 553.

The same doctrine applies to homestead entries.

Spratt v. *Edwards*, 15 L. D., 290.

In all it is held, when these preliminary acts prescribed by the preemption laws, including the payment

of the price of the land, have been performed, the claimant for the first time acquires a vested interest in the premises occupied by him.

Worth v. *Branson*, 98 U. S., 11; 25 L. D., 86.
Hutchins v. *Lowe*, 15 Wallace, 77.
Frisbee v. *Whitney*, 9 Wall., 187.

The Government of the United States, as well as the contestant, is interested in determining whether or not a tract claimed is mineral.

Caledonian Min. Co. v. *Roan*, 2 L. D., 714, 719.
Magalia Gold Min. Co. v. *Ferguson*, 3 L. D., 234.

And if the question of the character of the land is properly presented at any time before a patent, the duty of the Department is to ascertain whether or not the land shows valuable deposits, either in an *ex parte* case or a contest.

Cole v. *Placer*, 13 L. D., 86, 89.
United States v. *Iron & Silver Min. Co.*, 128 U.S., 673, 685–686.

And after such investigation and determination has been made, until the final entry and payment, such hearing and decision does not preclude a further hearing. The judgment will be conclusive up to the date at which the former hearing was had, but not subsequent to that.

Spratt v. *Edwards*, 15 L. D., 290–292.
Stinchfield v. *Pierce*, 19 L. D., 12.
Dargan v. *Koch*, 20 L. D., 384.
Coleman v. *McKenzie et al.*, 28 L. D., 348.

These decisions were nearly all made at a time when the law excepted from the operation of the pre-emption

and homestead entries only known mines or known salines, and it was held that these known salines or mines meant known at the date of the sale.

Nicholas Abercrombie's case, 6 L. D., 393.
Harnish v. *Wallace*, 13 L. D., 109.

The same is held with reference to the entry of a town site.

Thomas J. Laney's Case, 9 L. D., 83.
Plymouth Lode Case, 12 L. D., 513.

And was applied to homestead entries.

Spratt v. *Edwards*, 15 L. D., 291.

And furthermore, this date of the sale in the case of a homestead is not the date when the original entry is made, but when the final proof is made and final payment.

Spratt v. *Edwards*, 15 L. D., 291.
Jones v. *Driver*, 15 L. D., 514, 518.
Rea v. *Stephenson*, 15 L. D., 37.

See also—

Barden v. *Northern Pac. R. R. Co.*, 154 U. S., 284.
Stimson Land Co. v. *Rawson*, 62 Fed., 426.

2. *The Land Department has not, by any action or decision in this proceeding, done anything to divest the title of the United States whereby any title, legal or equitable, has vested in the applicant.*

It is apparent from a glance at the forest-reservation lieu land act, which is quoted in the petition, and under which the proceeding to obtain the patent was taken by the applicant, that in every case that arises under

the act there are many questions to be determined, and, under the authorities which we have already cited, those questions are to be determined by the Land Department. In every case the following questions are necessarily involved:

1. Is the tract of land claimed by him covered by a patent?

2. Is the land which is claimed within the limits of a public forest reservation?

3. Is the applicant the owner of the tract?

4. Is the instrument tendered by the applicant sufficient in form as a relinquishment of the tract to the Government of the United States?

5. Are the lands selected by him, in lieu of said tract covered by a patent, vacant lands open to settlement?

6. Do the lands so selected equal in area the tract covered by the patent?

It is not until all of these questions are determined in the affirmative that the applicant is brought within the provisions of the act.

We proceed now to the consideration of what is shown by this record to have been actually done.

1. The applicant executed deeds to the lands in the forest reserve, acknowledged and recorded them, and produced those deeds, together with the affidavits of Barion, and an abstract of title, and the application itself for the selection of lands in lieu thereof, and gave them to the register of the local office at Visalia. The local officer certified that the lands selected were free from any claims on the records in his office, and these

papers, and also the protests which were filed, were forwarded to the Commissioner of the General Land Office. So far there is clearly no adjudication approving the proposed selection.

2 A hearing was had before the Commissioner of the General Land Office, in which that officer not only did not decide any one fact in favor of the applicant, but ordered a hearing to be had concerning the character of the lands selected. (For the opinion of the Commissioner, see Rec, pp. 57–71.)

3. From this decision of the Commissioner the applicant Clarke appealed to the Secretary of the Interior. (Rec., pp. 72–76.)

The case was there heard under the title of The Kern Oil Company and others against Clarke, and The Gray Eagle Oil Company against Clarke. After argument, both oral and written, before the Secretary of the Interior, the decision of the Secretary of the Interior was not only against selector (see Rec., pp. 78–97), but it concluded as follows:

> In view of the present occupancy and known value of the lands for mining purposes, as hereinbefore stated, it is apparent that the required proofs can not now be supplied. The selections are accordingly rejected. The order of your office directing a hearing is hereby vacated. (Rec., p. 97.)

Clarke made a motion for a review of this decision. (Rec., pp. 100–103.)

Which motion was denied in an opinion in which the

previous action of the Department was affirmed. (Rec., pp. 105–120.)

From this record of the proceedings it is perfectly obvious that, from the filing of the papers at the local office until the final rejection of the applications, nothing was done by way of approval of the attempted selections, but, on the contrary, at every stage of the proceeding the decision was adverse to the selector's claim.

3. *The register and receiver have no original jurisdiction to accept or approve the selection of land in lieu of land embraced within a forest reservation, or to pass such land to patent. Their duty is simply to receive the papers and transmit them for the action of the General Land Office.*

The claim is manifestly put forward in the petition for the writ of mandamus that by this action before the register and receiver of the Visalia land office an equitable title vested in the petitioner, and that it then and there became entitled to a patent. This is a complete misconception of the functions of the local officers. The action of the register and receiver did not amount to anything. They had no power in the premises, except such as was conferred on them by the regulation of the Department, and that regulation provided merely that the application and these other papers should be delivered to the register, and that the latter should forward the same to the Commissioner of the General Land Office, with his certificate of the state of the records in his own office. Neither the act nor

the regulations authorized them to decide anything, nor did it make them, or either of them, the agent of the Government to receive the deed. Their power was simply to act as the medium for the transmission of the papers of the applicant to the Commissioner for his consideration and determination.

In the petition it is suggested that by the act of January 27, 1898 (Statutes, 234), it was provided that the register and receiver for each land district shall have charge of and attend to the sale of public and Indian lands within their respective districts, and it is averred that upon the delivery and surrender of the deeds of relinquishment and the filing of the declaration of selection the register and receiver made further examination of the records of their said office, and, by virtue of the *original jurisdiction* conferred upon them by said act of January 27, 1898, then and there accepted on behalf of the United States the said deeds of relinquishment and the said declaration of selections and appended thereto their certificates, etc. (Rec., p. 10.)

And these averments are aided with liberal italics, apparently with the notion that in some way or other great force is added by those italicized words.

But the statute to which they refer has nothing whatever to do with the matter.

The act to which they refer is an amendment to section 2234 of the Revised Statutes, which by the amendment of January 27, 1898, was made to read as follows:

> SEC. 2234. There shall be appointed by the President, by and with the advice and consent

> of the Senate, a register of the land office and receiver of public moneys for each land district established by law, who shall have charge of and attend to the sale of public and Indian lands within their respective districts, as provided by law and official regulations. The receivers shall be accountable under their official bonds for the proceeds of said sales, and for all fees and commissions or other moneys received by them under provision of law or official regulation.

To say nothing of the fact that other laws even more forcible in expression as giving color to the supposition that they might have been intended to qualify or restrict the general powers which the Secretary of the Interior and Commissioner have over the disposition of the public lands, have been held to not have any such effect, this section of the Revised Statutes has no application to the laws for the disposition of public lands with which we are dealing.

The original section simply provided for the appointment by the President, with the advice and consent of the Senate, of the register of the land office and receiver of public moneys for each land district. The rest was added by that amendment. That section is in Chapter II of the Revised Statutes, under the title of "Public lands," and it is entitled "Registers and receivers," and their power and authority and duties generally are there prescribed.

The next chapter of the same title is entitled "Land districts." Chapter IV takes up the subject of preemption under the name of "Preemption." Chapter V

is entitled "Homestead," and deals with homestead entries. Chapter VI treats of the mineral lands and mining reservations. Chapter VII is entitled "Sale and disposition of the public lands," and this subject is dealt with in the Revised Statutes, beginning with section 2353, the first section of which is that "All the public lands, a sale of which is authorized by law, shall, when offered for public sale to the highest bidder, be sold either in half or quarter sections."

Then follows the scheme for the sale of these lands, which sales the register and receiver are to attend.

The reading of these sections upon this subject will show that the amended section was never intended to affect the supervisory power of the Secretary and the Commissioner of the General Land Office even as to those sales, and it has nothing to do with anything else.

Chapter VIII of the Revised Statutes is on the reservation and sale of townsites on the public lands.

Chapter IX, the survey of the public lands; Chapter X, of bounty lands.

It will thus be seen that the statute here referred to does not in any way qualify, modify, or change in any respect the laws which have been enacted for the disposition of the public lands.

4. *It is impossible, from the nature of the transaction, for the register and receiver to be in position to pass upon the essential elements of the selection or to determine its validity.*

The absurdity of the claim of original power in the register and receiver of the land office is made obvious

in this identical case. It will be seen that the land which is claimed by the petitioner to have been relinquished to the Government of the United States is located in the forest reserve known as the Cascade Reserve, in the State of Oregon, and the deeds of relinquishment were recorded in the office of the county of Klamath, in the State of Oregon. Now, as the register and receiver of the local office of Visalia, Cal., knew nothing whatever of the existence of any such reservation as the Cascade Reservation in Oregon, or of the state of the titles in Klamath County, it would be absurd to suppose that the Government of the United States had intended to confer upon local officers the power and jurisdiction to dispose of the public domain in exchange for lands in respect of which they had no knowledge and no means of information.

In the petition we are informed, in a rather mournful tone, that by section 2 of the act of March 3, 1883 (22 Statutes, 482), the registers and receivers of local land offices were required, upon application, to furnish official information as to what land was vacant and what lands are taken (the words vacant and taken being italicized), and then the petitioner avers that on the 14th day of December, 1899, Clarke made inquiry of these officers and received the information that the lands were vacant and open to settlement so far as appeared on the tract books and records in their office.

It will be observed that this act of March 3, 1883, was passed more than fourteen years before this forest

reserve exchange law, and therefore could have had no special reference to the administration of that law, nor is it at all limited in its application. Anybody has the right to go to the register and receiver and seek information as to what the records of their offices show with respect to the public lands, no matter what his object may be, and the register and receiver had been giving this information for fourteen years before this act was passed, and sixteen and more before this application was made; yet we have just cited numerous authorities to the effect that notwithstanding homestead claimants and preemption claimants, and States and railroad companies, and every other sort of corporations and individuals, have made entries or selections upon the faith of those statements of the register and receiver or the information obtained from their local records, nevertheless the entries have been canceled whenever in the judgment of the Department, upon proper evidence, they appear to have been improperly allowed.

There is in the information given by the register and receiver nothing except simply a statement as to what their own records show. Even if they made a mistake in that, there is nothing in the nature of an estoppel in it. But everything which they state may be true, and was true in this instance, when Clarke went there, yet there may exist *in pais* facts which make the selection impossible; to constitute a valid and insurmountable objection to the issuance of a patent to Clarke it is not necessary that the facts constituting

that objection should appear upon the records of the local office; for, as we shall show in a moment, there may exist an absolutely insurmountable objection and no record of it whatever exist upon the books of the local register and receiver.

For instance, under the mining laws it has been determined repeatedly by the courts of the country that when one has made a location in conformity with the laws of the United States there vests in him the right to the exclusive possession of his mining claim. In fact, the statutes expressly say so; and the courts go further, and say that not only does that right vest, but it withdraws the lands from the character of public lands, and that the Government of the United States itself can make no disposition of them adverse to the location.

Noyes v. *Mantle*, 127 U. S., 348.
Belk v. *Meagher*, 104 U. S., 279.
Forbes v. *Consolidated Mining Co.*, 94 U. S., 762.

In *Belk* v. *Meagher* (*supra*) it was, among other things, said that there was nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by valid location than it is for *any other grant from the United States.*

In *Noyes* v. *Mantle* (*supra*) the court, after saying that when such locations were perfected under the law they were the property of the locators or parties to whom the locators had conveyed their interests, and after quoting from *Belk* v. *Meagher*, said:

> It is not, therefore, subject to the disposal of the Government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned and are known to exist, the applicant for the patent must include them in his application, or he "will be deemed to have declared that he had no right to them."

But in locating a mining claim under the laws of the United States nothing ever appears in the local office in respect to its claim or its location, unless and until the owner of the claim desires to obtain a United States patent, and then he makes application to the local land office. But without such application the law does not require any entry to be made in the books of the local office, and none is made.

In the cases of *The Cosmos Exploration Co.* v. *The Gray Eagle Oil Co.*, and *Pacific Land and Improvement Co.* v. *The Elwood Oil Co.*, 112 Fed. Rep., 4, the court said:

> The contention of appellant, that the act of Congress has reference only to vacant land open to settlement which appears upon the books of the Land Department, can not be sustained.
>
> In the brief of appellant counsel say: "It is respectfully and confidently submitted that this word 'vacant' has never been held to apply merely to unoccupied public lands, but to all public lands which the records of the Land Office show are unreserved or unappropriated, whether actually occupied or not. In other words, the term 'vacant lands' in General Land

> Office parlance, from time immemorial, has meant simply this: Those public lands which are unreserved and unappropriated as shown by the records of the General Land Office.'

But after the quotation from the brief the court disposed of the contention thus:

> Some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented. It would be absurd to say that such lands were vacant and open to settlement because the books of the Land Department do not show that they have been settled upon. The possessory rights of the miners have always been recognized by law, although in all such cases the legal title to the land remains in the Government. (*Cosmos Exp. Co.* v. *Gray Eagle Oil Co.*, 112 Fed. Rep., 16.)

Under the homestead laws, a settler upon unsurveyed lands acquires thereby the right to make entry under the homestead laws if he possesses the proper qualifications, and the lands are subject to entry under those laws, which right he can exercise at any time within three months after the survey is made, and the approved plats filed in the United States land office; but it has been held under this forest-reserve law that the applicant may select unsurveyed as well as surveyed lands, and under the homestead laws one might be a settler upon land under the authority of the laws of the United States, and having the right to remain in possession and to obtain the title of the land, yet no

evidence of that fact would appear in the records of the land office.

5. *The applicant can not by the mere voluntary relinquishment of his own land divest out of the United States the land which he proposes to select in lieu of it.*

It has been insisted in this controversy that the applicant acquires some sort of a right by reason of the mere fact that he has, as it is claimed, delivered his deed to the Government. But it is obvious that he has not delivered it until the matters necessary to be determined have been passed upon by the Government and the deed accepted. The mere fact that a deed is placed in the hands of the grantee does not constitute a delivery. The grantee in all cases has the right to examine the deed to ascertain whether it is sufficient, and in this case the Department has the right to receive it and hold it until a reasonable time has elapsed for determining whether or not the land was subject to a selection, and all other questions which are involved in the right to a patent.

Harris v. *Harris*, 59 Cal., 620, 622.
Tiedeman on Real Property, sec. 812.
3 Washburn on Real Property, p. 254, sec. 28.
Los Angeles Immigration and Land Cooperative Association v. *Phillips*, 66 Cal., 539, 551–554.
Ryan v. *The United States*, 136 U. S., 68, 85, 86.

It must be plain that the selector can not, by handing in a deed of his own property containing the statement that he relinquishes it *in order to accept in lieu thereof other land to be thereafter selected*, by that mere

act alone divest out of the United States whatever land he chooses to select without the United States being able to pass upon the character and nature of the land thus sought to be taken, or upon any other question on which his right to select it depends.

Furthermore, if the claim be that, by his relinquishment, he has parted with his own land to the United States, and has the right, therefore, to select an equal area in lieu thereof, then the answer is that the rejection of his *first* application to select does not in any manner impair the interest of the applicant. It simply determines that the particular lands which he then seeks to select are not subject to selection, but it does not deprive him of the right of selecting other lands which are subject to selection. That this was the theory of the law upon which the selector himself acted is conclusively shown by the fact that in the surrender of his lands for the purpose of thereafter making a selection he surrendered 12,789 acres in one body and by one deed (Rec., p. 3–4), whereas the land which he selected at the same time was not to exceed 200 acres. It is obvious that he conceives himself to have at the present time the right to select over 12,500 acres additional, and if his claim to the 200 acres is rejected, his right to select the full number of 12,789 acres remains unaffected and unimpaired as at the beginning.

But whatever may be the exact nature of the right of the selector, after he has voluntarily made a conveyance of his own land "for the *purpose of thereafter selecting* other lands in lieu," it is clear that the claim

that his own conveyance completes the transaction and takes away the land in lieu is altogether dependent upon a construction of the act that will leave the Land Department nothing in the world to do. In other words, his case is dependent upon the assumption that his right to the selected land vests because there remains, after the relinquishment, nothing whatever to be done except for him to indicate the land he desires to take. This proposition the petitioner seeks to maintain by arbitrarily construing the term "vacant land open to settlement" to mean merely land in respect of which there is no record of appropriation upon the records of the local register, which are thus made absolutely conclusive as to the character and description of the land.

"If," says the petitioner, "land not taken of record at the local office happens to be in the lawful occupancy of a person initiating a right, or to be the lawful property and in possession of miners under valid mining claims, perfected by location and discovery, it is, nevertheless, vacant for my purposes, and so much the worse for the miners."

We shall now endeavor to show that the act of June 4, 1897, construed in conjunction with the other Public Land Laws of the United States, can have no such meaning.

FOURTH POINT.

The Land Department is correct in its construction that the term vacant lands open to settlement excludes mineral lands and lands occupied under the local customs or rules of miners.

The regulations based upon that construction are consequently valid.

One of the claims put forward in the petition for the writ of mandamus is that the Land Department had no power to make the regulation which the selector, Clarke, failed to comply with. It is obvious that the validity of this regulation rests upon the true construction of the act of June 4, 1897, in conjunction with all the other statutes of the United States governing the disposition of the public domain, all of which are in pari materia and form the body of Public Land Law of which this particular act is but a part.

The true construction of the term "vacant lands open to settlement" can not be reached by looking simply at the act of 1897 alone. The land subject to be taken is not merely "vacant" land, but it must be also "vacant land open to settlement." Now, not only is the word "vacant" itself one of various significations, both in common speech and in legal terminology, but the term "open to settlement" refers us at once to all the other legislation upon the subject-matter in which provision is made as to the sorts and descriptions of lands which may be taken up under the land laws, and the different modes of procedure by which title to them may be acquired.

The main ground urged in the petition and briefs against the validity of the regulations requiring an affidavit of nonoccupancy is that the word "vacant," as used in this act, means unappropriated on the tract books of the local land office, and has no reference to the actual occupancy of the land itself, no matter how lawful that occupancy may be.

Counsel reiterate in the petition a favorite dogma of theirs that "vacant land open to settlement" has had fixed upon it a meaning by Congressional, judicial, and departmental usages and interpretation, and that such meaning is "public land appearing on the records of the Land Department as land not taken up and occupied." They have never yet succeeded in producing the long Congressional usage or judicial interpretation or anything else fixing any such meaning. On the contrary, decisions are numerous, under various acts of Congress, where the term "vacant" has received no such meaning and has been held to have been used in no such sense. Indeed, the meaning of it generally is just what all understand it to mean—unoccupied—and where it has any different signification that fact is usually discernible from the context. Thus, in reports of the Land Department to Congress, in giving out statistics concerning the public business, no doubt when they speak of so much land having been sold and so much more remaining vacant they have reference to their own records, for they could not know what lands were actually occupied. But, according to the Standard Dictionary, the word "vacant" means "containing or holding nothing; being without contents or occupants; especially devoid of occupants; empty, unfilled; unoccupied; void; as a vacant house, room, or chair." Again, "vacant," as used in the case under consideration, is considered by the Land Department to mean unoccupied. See the opinions delivered in this case and set forth both as a part of

the petition for the writ of mandamus and of the return. It was considered in the same manner by the United States circuit court of appeals in the ninth circuit, in *Cosmos* v. *The Gray Eagle Oil Co.*, and *The Pacific Land and Improvement Co.* v. *Elwood Oil Co.*, 112 Fed., 4, 14–18. In *Atherton* v. *Fowler*, 97 U. S., 513, this court, after saying that at the moment the land on which the hay was cut became liable to preemption the whole of it was by the various persons claiming under Vallejo (1) settled on by them in person; (2) inhabited and improved by them; and (3) that a dwelling house was erected on it by them, said:

> Unless some reason is shown not found in this record, these were the persons entitled to make preemption and no one else. But suppose they were not. Does the policy of the preemption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they settle, and by these acts acquire initiatory right of preemption? * * * The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land; to erect a dwelling house did not mean to seize some other man's dwelling. It had reference to *vacant land*, to *unimproved land*, and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate right to the public lands by trespass, by robbery, by violence, by acts leading to homicides and other crimes of less moral turpitude.

See also the numerous cases cited in the Cosmos case, at the pages referred to, namely, pages 14–18, and the case of *Shaw* v. *Kellogg* (170 U. S., 312), from which this passage was quoted:

> The grant was made in lieu of certain specific lands claimed by the Vaca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere in the limits of New Mexico. The grantees, the Vaca heirs, were authorized to select this body of land. They were not at liberty to select lands *already occupied by others. The lands must be vacant.*

This is the word used in the act. They were entitled to select other "vacant lands," which the court here manifestly construed to mean unoccupied.

No matter, then, how many acts of Congress or public documents may be produced wherein this word "vacant" may appear to have, or actually have, a more restricted signification, it is perfectly obvious that it can have no such meaning here. The language of the act is "vacant and open to settlement." Now, in many of these cases (which are cited in the opinion in the Cosmos case) it has been decided that lands occupied by one are not open to settlement by another; and as to the mineral lands, they, as a matter of law, are not open to settlement. Even that title which comes merely by location does not require a possession in order to maintain it, as was shown in the cases already cited (*Belk* v. *Meagher*, *supra*). The Government of the United States has by all of these

laws, by the preemption laws, though now repealed, and by homestead laws invited all persons possessing the qualifications required by those statutes to go upon the public lands and make a settlement and make improvements thereon, and under some of them, especially the preemption and homestead laws, making these improvements and the cultivation of the land were essential conditions to obtaining the title. Under the mineral laws all citizens of the United States are licensed and invited to occupy them and explore them for the purpose of developing the mineral resources of the United States, and when the people have, in pursuance of this invitation and license, gone upon these lands, either for the purpose of making a settlement and acquiring title for agricultural purposes or for exploring them for minerals and developing their mineral resources and working the same, it would require language far stronger than any that is employed in the act of 1897 to support the contention that the Congress of the United States intended to license these forest-reserve claimants to dispossess all persons claiming under any laws, unless their claims were placed of record in the office of the district where the lands were situated.

Although it is not denied by us that Congress might have the power to deprive one who has gone upon the public lands under its invitation of the improvements which he has put upon it, and of the labor and money expended in its development, at any time before a vested equitable title has accrued, yet the courts do

not indulge in strained construction of statutes to accomplish any such unjust and mischievous result. The situation here, indeed, is stronger than that; under the showing made by the protestants in this case, they had a perfect right, which even Congress could not interfere with by any act for the disposition of those lands. But, apart from that, we respectfully submit that there is nothing in the language of the act under consideration which justifies the belief that Congress had any intention whatever of authorizing the invasion of other people's houses or taking other people's property put upon the public lands of the United States under the invitation of the laws of the United States.

FIFTH POINT.

The regulations requiring a nonmineral and nonoccupancy affidavit, being based upon the true construction of the term "vacant land open to settlement," are an appropriate and necessary means for carrying into effect the intent and true meaning of the act of June 4, 1894.

As we have seen the chief claim which is put forth in the petition for the writ of mandamus is that the Department had no power to make the regulation of which they complain, and with which the selector did not comply. And this both as to nonoccupancy and nonmineral character. But the nonmineral affidavit is no new thing. The regulation requiring nonmineral affidavits has been in force for many years, and it is required from all applicants for lands under any laws except the mineral laws, and with the exception

of certain States which have been taken out of the operation of the general rule. The mineral lands can only be acquired under the laws providing for the disposition of those lands. If the regulation was unreasonable with respect to Clarke and his selections, it must be equally so as applied to all other selectors. As we said before, that is not a regulation directed against forest lieu claimants only, but against all applicants to purchase public lands. The regulation will be found in the pamphlet printed at the Government Printing Office in 1899, and the rules issued on July 11, 1899, and on page 87 of this circular, under the title of "general rules applicable to different classes of entries."

The twenty-fourth rule is as follows:

> In all entries of nonmineral land in the States of Arkansas, California * * * a nonmineral affidavit is required.

The stars above are for the other States and Territories of the United States, but as these lands are in California it is sufficient to show that that was one of the States included; and this, we say again, is a general regulation. Did not the Department have the power to prescribe such a regulation? It has been decided frequently by this court, as well as other tribunals, that since the passage of the acts of July, 1866, and of 1870 and 1872, and the various amendments thereto, expressly providing for the disposition of the mineral lands, such lands are not subject to disposition under any other general laws whatsoever. It does not

require any exception of mineral lands from an act of Congress providing for the distribution of the public domain, but they stand excepted. It follows that if the Department has any power to make regulations at all, it must have the power to make such regulations as will prevent the taking up of mineral land under color of laws not providing for their disposition. That the Department has the power to make regulations has also been frequently decided.

> *Knight* v. *The U. S. Land Ass'n*, 142 U. S., 161, 177.
>
> *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155.

See also *Germania Iron Co.* v. *James*, 89 Fed., 811, 813–818, and the authorities there cited; and

> *Hoover* v. *Salling*, 102 Fed., 716.
>
> *James* v. *The Germania Iron Co.*, 107 Fed., 600–603.
>
> *United States* v. *Winona and St. Paul R. R. Co.*, 67 Fed., 948.
>
> *Lewis* v. *Shaw*, 67 Fed., 516–518.

And, finally, in the controversy arising upon these very attempted selections, in *Cosmos Exploration Company* v. *The Gray Eagle Oil Co.*, and *The Pacific Land and Improvement Co.* v. *The Elwood Oil Co.*, 112 Fed., 4, after a careful examination of the legislation relating both to mineral lands and forest lien selections, it was determined by the circuit court of appeals for the ninth circuit that these identical regulations were not only within the power of the Department, but were reason-

able and valid. The conclusion of the court is as follows:

> The Commissioner of the General Land Office has authority to make regulations respecting the disposition of the public land, and such regulations, when not repugnant to acts of Congress, have the force and effect of laws. The regulations of the Commissioner relative to lieu land selections under the act of June 4, 1897 (prescribed June 30, 1897), are in our opinion reasonable, and evidently were intended, and are well calculated, to carry into effect the intent and true meaning of the act of Congress. They are properly within the limitations of the law for the enforcement of which they were promulgated, and should be complied with. (112 Fed., 11, 12.)

The other objection to the action of the Department complained of by the petitioner is that it had no power to prescribe the regulation requiring and asking an affidavit of nonoccupancy, and the reason urged is that the word "vacant" as used in this act means merely unappropriated on the tract books of the local land office, and has no reference to the actual condition of things upon the land itself.

But in the discussion of the true meaning of the term "vacant land open to settlement," we believe that we have already shown this contention to be groundless. (See authorities already cited under the FOURTH POINT.)

Attention is drawn in the brief of counsel for the petitioner to the case of the *United States* v. *Frederick*

G. Maid, in the district court for the southern district of California, as a supposed authority against the power of the Secretary to make the regulation complained of in this case. It is furthermore urged that the Secretary, in his appeal to Congress, has admitted the invalidity of such regulation. (Rec., pp. 130, 131.) But in this very case of *United States* v. *Maid* the regulation requiring a noncmineral affidavit was expressly recognized as valid for the purposes of determining *property* rights, although it might not have been the intention of Congress to make an infraction of it a criminal offense.

> "A Department regulation," said the court, "may have the force of law in a civil suit to determine property rights, as in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* (*supra*), and yet be ineffectual as the basis of a criminal prosecution (*United States* v. *Eaton*, *supra*). The Supreme Court of the United States, in the case last cited, marks the distinction thus:
>
> "'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'" (*United States* v. *Maid*, 116 Fed., 650, 652.)

The doctrine thus laid down in *United States* v. *Eaton* (144 U. S., 677), and relied on to mark the distinction between the civil purposes and the criminal effect of a regulation, is again expressly recognized and affirmed by this court in the case of *Caha* v. *The United States* (152 U. S., 209).

And the Secretary, in his request for further legislation, plainly indicates that what is required is merely further provision for criminal prosecution.

SIXTH POINT.

The writ of mandamus was properly refused.

Upon the authorities already cited, it is submitted first that the decision of the Secretary of the Interior was a correct application of the law under which this controversy arose; that "vacant" has no reference to the tract books in the local land office, but it has reference to the land itself; that all of the supposed hardships of which the plaintiff in error complains are exactly the same that are encountered by every other person who goes to the land office to enter lands under any other law.

For example, preemption and homestead claimants were constantly being advised by the register and receiver, under this same act of 1883, for fourteen years before the passage of this forest-reserve act, that lands which they sought to obtain did appear upon the books to be free and open to settlement and claim by them. Nevertheless the cases are numerous where, notwithstanding such information, and notwithstanding that such persons had made entry upon it, or at least had

taken the initiatory steps, and had cultivated and improved the lands at great expense, still, by reason of discoveries made afterwards, their claims were defeated because the lands were not of the character subject to selection—an event which could not have occurred to them if the tract books and other records in the local office alone were to determine such questions.

The records of the local office did not show any claim of record in the preemption controversies and controversies with homestead claimants that were considered and determined in the cases to which we refer. See those cited in the opinion of the circuit court of appeals of the ninth circuit in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 112 Fed., 4, 14–18. We allude to the case of *Atherton* v. *Fowler*, and a large number of others, in which the doctrine there laid down has been followed. That doctrine is that these preemption and homestead laws did not authorize one person to invade the possession of another and seize the property which he had placed upon the public lands; that lands which were occupied by another were not subject to such claims.

But this also was a conclusion which could not have been reached if the records of the local office were alone to be looked to for the character of the lands. The principles decided in those cases are of universal application. In *Basey* v. *Gallagher* (20th Wallace, 670, 681–682), the court said:

> In the late case of *Atchison* v. *Peterson* we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held

that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the Government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor. * * * That the Government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866.

Now, it will be noted that Mr. Justice Field is, in this opinion, dealing with the condition of things prior to the first act passed by the Congress of the United

States for disposing of the mineral lands, and he said that the Government, by its silent acquiescence, had *assented to and encouraged the occupation of the public lands for mining*, and because of this "he who first connected his labor with property thus situated and open to general exploration did, in natural justice, acquire a better right to its use and enjoyment than others who had not given such labor."

But, since the passage of the mining laws, there is no longer a mere *silent acquiescence*, but in express terms these mineral lands are declared open to exploration and occupation. (R. S., secs. 2319, 2320.)

Under the showing made by the protestants here, they had valid mining locations completed and perfected, so that the lands were no longer part of the public domain, and were not subject to the disposition of the Land Department; but even if the claim of the petitioner were correct, namely, that they lack one element of the perfected locations, namely, the discovery of the mineral, yet nevertheless they were there, claiming under the mining laws, in the occupancy of the land, and having expended large sums in the construction of buildings and erecting machinery for the exploration of these lands, and were exploring them, and they were not "vacant" in the sense of the statute.

But if we are mistaken in this, it nevertheless does appear on the face of the statute itself that many questions must necessarily be determined by the Land Department before a patent can issue in these cases,

and that in arriving at that determination the Department acts judicially, and in these cases the very opinions delivered by the Commissioner and the Secretary of the Interier do of themselves show that the character of questions there submitted to them by the plaintiff in error, as well as by the adversaries, were judicial in character.

For example, viewed in its most favorable light, the case of the plaintiff in error is still dependent upon the assumption that the construction which it places upon the act of June 4, 1897, is its perfectly obvious and indisputable meaning, yet not only the Commissioner of the Land Office and the Secretary of the Interior (twice acting with the advice of the Assistant Attorney-General), but four courts, to whom that construction has been proposed, have all united in rejecting it.

If all these tribunals can reach a conclusion contrary to the construction contended for by the plaintiff in error, it is but according to the members composing them the possession of ordinary faculties to infer that the act is at the least reasonably susceptible of two constructions. If susceptible of two constructions, its administration can not be a purely ministerial act. Whatever may be the power of any court having jurisdiction over the land itself to construe acts upon which the title to it depends, it is clearly not the function of the courts of the District of Columbia to adjudicate such title or by mandamus to impose one construction rather than another upon the Land Department. The power of the courts of the District of Columbia is

limited to commanding the performance of a simple, definite statutory duty—a duty which involves no judgment and no discretion. But the choice between two reasonably possible constructions of which a statute is susceptible is neither a simple nor a definite duty. It is surely not ministerial.

But the questions dealt with by the Land Department were the same questions that were submitted to the circuit court of the ninth circuit, and dealt with by Judge Ross in the opinion in the Cosmos Exploration case and *The Pacific Land and Improvement Company* v. *Ellwood*, reported in the 104th Federal Reporter. From which decision the appeal was taken, and which was determined by the circuit court of appeals in the 112th Federal Reporter.

When these courts were dealing with these questions they certainly were acting in a judicial character, and the questions which they were considering were judicial. Were they any different when they were before the Department? The Department was necessarily called upon to construe the act. It had jurisdiction over the subject-matter and of the parties, and it did construe it; and whether that construction was right or wrong, its discretion can not be controlled by the writ of mandamus.

The principle here contended for is so familiar and well settled that we do not deem it necessary to do more than present a few of the authorities upon that subject.

Litchfield v. *Richards*, 9 Wall., 575, 577.
Gaines v. *Thompson*, 7 Wall., 347.

Noble v. *Union River Logging Co.*, 147 U. S., 165, 176, 177.

City of New Orleans v. *Paine*, 147 U. S., 261, 263, 264.

United States ex rel. Dunlap v. *Black*, 128 U. S., 40, 45.

Decatur v. *Paulding*, 14 Pet., 497, 499.

Furthermore, if any doubt may rightfully exist in the mind of the court on the subject, an answer is furnished to the application for mandamus. (*Carrick* v. *Lamar*, 116 U. S., 423, 426.)

If the act be one requiring the exercise of judgment or discretion, whether in the ascertainment of fact *or the interpretation of law*, it makes no difference how gross an error may be committed or however ill advised the action of an executive officer may be.

Seymour v. *South Carolina*, 2 App. D. C., 240, 245.

Lochren v. *Long*, 6 App. D. C., 486, 505, 506.

Nor will the writ be issued merely because the law has not provided any other remedy. Said the Supreme Court of the United States:

> The writ of mandamus can not be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ can not be issued to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. (*In re Isaac L. Rice*, 155 U. S., 396, 463.)

See also the case cited—*American Construction Company* v. *Jacksonville T. & K. W. R.* (148 U. S., 372, 379.)

SEVENTH POINT.

Lands in which petroleum exists are mineral lands under the mining laws of Congress.

The petitioner has reached the conclusion that petroleum is not a mineral, and that, though the acts of Congress, especially that of February 11, 1897, provide that they may be entered as mining lands, Congress did not thereby intend to declare that they were mineral lands.

For the fact that they are not mineral we are treated to a dissertation upon the most recent views of scientists as to the nature of petroleum and its origin, and that Congress did not intend to define petroleum as a mineral by the act of February 11, 1897, a lengthy discourse on the Stone Act of 1892, and the construction of it by the Department, wherein it seems to have been held that the fact that they might be entered under the mining laws was not the equivalent of declaring them to be mineral.

But, ingenious and entertaining as this disquisition is, as an abstract matter, we are here dealing with the act of Congress, and the events and constructions of laws which gave birth to it. Prior to a decision of Secretary Smith, in August, 1896, there had been repeated decisions of the Land Department that petroleum was a mineral, and subject to be entered under the mining laws. This opinion had been entertained by several Secretaries of the Interior, and among them Secretary Teller and Secretary Lamar.

In the case of Samuel E. Rogers, decided December 16, 1885 (4 L. D., 284), certain locations made under

the placer mining laws, embracing lands containing deposits which were valuable for petroleum, were sanctioned and sustained. And so in *Roberts* v. *Jepson* (4 L. D., 60) the same rule was made. And so in the case of the Piru Oil Company, decided February 13, 1893 (16 L. D., 117 L. D.), an application for a patent based upon four placer locations, embracing an aggregate of nearly 640 acres of land, containing valuable deposits of oil, was recognized and sustained as within the provisions of the mining laws. And the doctrine of these cases was never disturbed until the decision of Secretary Smith of August 27, 1896, which was a complete departure from the rule which had been established and long maintained by his predecessors.

At the very next session of Congress after this decision of Secretary Smith that body passed the act referred to in the appendix to the brief of the petitioner. That it was intended simply to overrule the decision of Secretary Smith is perfectly obvious upon the face of it. We call attention to one or two of its phrases for the purpose of showing that Congress was not simply providing a means of entering the lands containing petroleum, but that they were considered mineral. The title of the act is this: "An act to authorize the entry and patenting of lands containing *petroleum and other mineral oils* under the placer mining laws of the United States." Here, in the title of the act, petroleum is obviously classified as a mineral oil, and the act intended to provide for the entry and patenting not only of the petroleum, but any other mineral oils.

Then in the body of the act, after providing that any person authorized to enter land under the mining laws of the United States may enter and obtain patents to these lands, it describes them thus: "Containing petroleum or other mineral oils, and chiefly valuable therefor."

And in the proviso the language is this:

> *Provided*, That lands containing such petroleum or other mineral oils, which have heretofore been *filed upon, claimed, or improved as mineral*, but not yet patented, may be held and patented under the provisions of this act, the same as if such *claim, filing, and improvement* was subsequent to the passage thereof.

It is of no consequence whether Congress was scientifically correct or incorrect. The lands belonged to the United States, and Congress had the power to provide for the disposition, and for that purpose to make a classification of the lands, and it has done so by language too plain to be mistaken.

"But," say counsel, "because of the peculiar phraseology of this act, no right in these lands would exist until they were entered;" which means, as we understand it, that, by making a location—that is, marking the boundaries and posting and recording the notice, which, although not required by act of Congress, is always resorted to as a means of notifying the world of the claim and discovering the mineral—no right whatever would accrue. In other words, that such locator would not, as declared in the Revised Statutes,

become entitled to the exclusive possession of the property. If this were so, it would seem that there would be no necessity for the location at all, no need of marking boundaries nor of doing any other thing to make the claim.

But, by turning to the Revised Statutes, it will be seen that the very same language here employed in this act of 1897 is used with reference to the placer mines in the general mining statute, namely, that placer mines may be *entered* in the manner provided for the entry of lode claims, but the courts have uniformly held that all of the other provisions apply, as, of course, they must, because under those laws an essential prerequisite of making an entry, either of the lode or placer, is that one must make the location, and it must conform as nearly as practicable to the United States surveys in the case of a placer location; and as these lands are to be entered under the placer mining laws, so, too, in making the location, they must conform to the survey, and must not exceed 20 acres to one claim or 160 acres to an association of eight persons.

Again, the proviso shows that counsel for the appellant do not correctly interpret this statute. We quote it again:

> *Provided*, That lands containing such petroleum or other mineral oils, *which have heretofore been filed upon, claimed, or improved as mineral*, but not yet patented, may be held and patented under the provisions of this act, the same as if such filing, claim, or improvement was subsequent to the date of the passage hereof.

To say nothing of the fact that the "filing" here obviously refers to the filing of the notice of the location, and which is not done in the United States land office, the other provision shows that there need not, under the statutes of the United States, be even that.

But if it has been *claimed*, in whatever manner, or *improved*, such claimant may continue to hold and may enter it and have it patented in precisely the same manner as if the filing, claim, and improvement had been made subsequent to the passage of the act. But if made subsequent to the passage of the act, according to the claims of counsel here, they would acquire no rights, and therefore the provision giving a like effect to claims which had been made before the act simply meant that they had no effect at all.

But that is not the interpretation. It was well known to the Congress of the United States that on the faith of the previous decisions of the Department a large number of persons had located petroleum lands under the placer-mining laws, and that this decision of Secretary Smith had rendered those locations nugatory so far as the obtaining of a patent was concerned, notwithstanding that they may have been made and explorations conducted at great expense to the parties; and Congress not only overruled Secretary Smith's decision, but gave effect to those locations which had been made prior to the decision in a like manner as if they had been made after the passage of the act.

EIGHTH POINT.

Having failed to bring his attempted selection within the terms of the statute by an averment in compliance with the regulation validly made to carry the statute into execution, no title whatever vested in the selector, Clarke, and none inheres in the petitioner claiming under him.

If the foregoing argument is not wholly unfounded, it must be taken as established: First, that vacant lands open to settlement exclude lands which are mineral in character and which are occupied under the customs or rules of miners; second, that the regulations which require averments to the foregoing effect are at once reasonable and necessary. It must follow, then, that if a person seeking the benefit of this act fails to comply with the requirements thus validly established, it is impossible that any duty can arise on the part of the Department to grant the relief which he prays—that is to say, to issue a patent in exchange. And unless a duty exists to issue a patent, it is obvious that he can not be regarded as entitled to it. The duty of the Department to issue and the right of the applicant to receive are identical in time as well as in law.

As was well said by the United States circuit court of appeals for the ninth circuit, the "party making an exchange of land under the forest-reserve act, like any other entryman upon the public land of the United States, only secures a vested interest in the lands which he has selected in exchange for or in lieu of the lands relinquished by him when he lawfully enters upon the same, and IN ALL RESPECTS COMPLIES WITH THE

REQUIREMENTS OF THE LAW UNDER WHICH HE CLAIMS HIS RIGHT. This general principle is too well settled to require any elaborate discussion. It has been so decided by this court in *Mortgage Company* v. *Hopper*, 12 C. C. A., 293; 64 Fed., 553–555; *Diller* v. *Hawley*, 26 C. C. A., 514; 81 Fed., 651–653." The latter case was brought to this court and was here affirmed (178 U. S., 476).

Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 112 Fed., 4, 12.

The essential requirements, as was said both by the Land Department and by the circuit court of the United States for the southern district of California in the case of these identical selections, to be complied with by a person seeking title to a tract of land in lieu of land covered by a patent in a forest reservation, are: (1) That he must relinquish to the Government the tract in a forest reservation and submit satisfactory evidence respecting title thereto; (2) that he must make selections of the tract desired in exchange for the tract relinquished, and accompany the selection by an averment on oath showing the selected land to be of the condition and character subject to selection.

If it be once admitted, or if it be, as we think, clearly established, that the construction of the Land Department is correct in respect of what character of lands is subject to selection, then the Land Department, as a judicial tribunal, proceeding according to the ordinary methods of judicial procedure, is not compelled to take cognizance of any application to select

lands which upon its face fails to show that the selector is proceeding to take that which he is permitted to take. If the application showed, for example, that the selector's proceedings were instituted to obtain land which must be admitted by everybody not to be subject to selection, it is obvious that such an application, although no protest against it should be filed, would not put the machinery of the Land Department into operation at all, nor would it call upon the Land Department to exercise its functions in granting the relief sought, viz, the issuance of a patent in exchange. In a word, the action of the Land Department can not be invoked except by such averments as show upon their face a state of facts sufficient in law to invoke its jurisdiction. It is necessary for the selector to make out a case.

The true construction of the act and the consequent validity of the regulations made for its enforcement in accordance with that construction, being once established, upon the failure of the selector (Clarke) to make the jurisdictional averments thus validly required to enforce the true construction (inasmuch as no duty is imposed upon the Land Department to take a single step further toward the determination of the possible legality of the proposed selection), no title can vest in the selector in the fulfillment or completion of that which the Land Department is under no duty to fulfill or complete. And here, before any attempt was made to supply such averments (as, for example, by the belated mineral affidavit of the following year), it had become patent to the Land Department that the lands were in truth mineral lands.

It is therefore also vain for the petitioner now to claim that the facts entitling him to a patent are set forth in the petition, even if such were the case, for the tribunal to which he was to apply for the patent and to which he was to make known the facts which entitled him to it was the Land Department; and that Department was called to act upon the showing made to it then, and not upon the allegations contained in the petition for a writ of mandamus. We have already, we think, shown that such showing did not make a case for the action of the Department.

For the reasons set forth above, we respectfully submit that the decision of the court below should be affirmed and the petition for the writ of mandamus be denied.

JOHN S. CHAPMAN,
Special Assistant to the Attorney-General,
HENRY H. GLASSIE,
Assistant United States Attorney.

WILLIS VAN DEVANTER,
Assistant Attorney-General.

O